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No. 91-893

# In the Supreme Court of the United States

October Term, 1991

THE DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY, a Minnesota corporation,
*Petitioner,*

v.

KYLE SMALLEY,
*Respondent.*

## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

Petitioner-Defendant Duluth, Winnipeg & Pacific Railway Company [hereinafter DWP] misrepresents the record below. Pursuant to Supreme Court Rules 15.1 and 24.2, Respondent-Plaintiff Kyle Smalley will confine himself to correcting these inaccuracies.

There was no "conflicting testimony regarding the nature and extent of Smalley's injuries" [DWP Petition at 5]. DWP confined its evidence at trial to liability. It presented no medical evidence or testimony, nor any testimony concerning Mr. Smalley's injuries, rehabilitation efforts or vocational possibilities.

The *only* doctors who testified *both disqualified* Mr. Smalley from working at his old job, and stated his injuries were permanent (Dr. Wengler Deposition at 28;

Dr. Carlson at 3, 7/20-25, 11/17-24, 13/18-23). These permanent injuries resulted in restrictions placed on his physical activity in the workplace, and disabled him from working for DWP. No one testified to the contrary.

Furthermore, Mr. Smalley did not make "general claims of unemployability" [DWP at 5], nor did he try to prove that he could never do any type of work. Indeed, his economist, Dr. Egge, subtracted from his calculations those amounts Mr. Smalley had earned prior to trial, and deducted for future earnings [Egge 27/7-13]. DWP presented no economic testimony.

There was no evidence of any kind that DWP had offered Mr. Smalley a job [DWP at 6]. As the Court of Appeals noted, there was a <u>suggestion</u> that such a job might be available, but there was never any testimony as to what it paid or whether

Mr. Smalley was physically capable of performing it. In point of fact, when Mr. Smalley's vocational rehabilitation counselor contacted DWP about job possibilities, she was told none were available.

Nor did Mr. Smalley's vocational counselor testify "that at least one of the tests disclosed that Mr. Smalley was exaggerating his symptoms" [DWP at 7]. This comment was in a note from the doctor who conducted an MMPI exam, and was labeled "extremely tentative." The counselor, Ms. Koskela, actually testified that the score indicated an extreme level of depression and difficulty with dealing with the physical limitations imposed by the injury [Koskela at 43/3-24].

Finally, Mr. Smalley did not claim that he was guaranteed $3,000 a month if he was injured. The guarantee was good only if

he were to lose his job because of the worsening economic conditions cited by Mr. Wollack. The point was that if Mr. Smalley had not been injured, he had a minimum, guaranteed wage of $360,000 for the next ten years in spite of the DWP's claims that he might have lost his job even without injury.

The uncontroverted damages evidence adduced at trial was that Mr. Smalley was permanently injured, that those injuries disqualified him from railroad service, and that his lack of education and limited abilities precluded him from all but menial labor.

The jury award of $85,100 was less than his past wage loss alone.

## ARGUMENT

DWP misconstrues the Appellate Court's decision as reversing on the grounds of sufficiency of the evidence or inadequacy of the verdict. These grounds were not advanced on appeal, nor were they the basis for the decision.

The Trial Court made an error of law in its instructions to the jury. When the jury has been misinstructed, the reviewing court must examine the verdict in the light of the record as a whole. If, based on the verdict and the evidence, it appears the jury may have been misled by the instructions, the verdict must be reversed.

In the instant case, the Appellate Court found the evidence of Mr. Smalley's injuries and damages to be uncontroverted and overwhelming. Given that the jury had found DWP 100% liable, and an award less

than his past wage loss alone, the Court found it not only possible, but likely that the jury was misled by the incorrect instructions on mitigation of damages. A new trial on the issues of damages alone was necessary.

DWP's claim that the Appellate decision was anything else is disingenuous. It's arguments concerning a conflict in the circuits on inadequate jury verdicts are not germane to the case as decided by the Eighth Circuit.

There are simply no constitutional issues or questions of national import requiring review by this Court.

## I. THE EIGHTH CIRCUIT GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED IN ITS JURY INSTRUCTIONS

Petitioner-Defendant Duluth, Winnipeg & Pacific Railway Company claims the Court of Appeals reversed the damages verdict based on a "sufficiency of the evidence"

standard [DWP Petition at 21-22]. The analysis set forth by the Appellate Court was not to determine if the evidence was sufficient to support the verdict, but rather to determine if the erroneous instruction was harmless error.

**A. The Trial Court's Instruction on Mitigation of Damages Was a Serious Mistake of Law**

The Trial Court gave DWP's requested jury instruction on mitigation of damages:

> With respect to loss of earnings in the past, you are instructed that if plaintiff could have worked in the past, but did not, you must not award him damages for loss of earnings for the time during which he might have worked. The issue in this respect is not whether plaintiff did work but whether or not he could have worked during all or any part of the time in question. Smalley v. Duluth, Winnipeg & Pacific Ry. Co., 297 F.2d 296, 297 (8th Cir. 1991).

The instruction on future damages made the same misstatement of law:

> Similarly, with respect to future loss of earnings, you are

> instructed that if plaintiff is able to work in the future, you must not award him damages for future loss of earnings, Id.

Under the rule of mitigation of damages, a jury reduces its award by the difference between the actual damage incurred and the amount that could have been avoided by reasonable efforts. See Restatement of Torts, Second, §918, comment (a). The instruction to deny damages completely is simply wrong as a matter of law:

> The precise error commented upon in Hays [Hays v. Pennsylvania R.R., 19 Ill. App. 2d 368, 153 N.E.2d 737,739 (1958)], and involved in the jury instruction tendered here, is that the Hays' jury was instructed that the plaintiff could not recover damages for any period for which the plaintiff might have worked in the past or might work in the future. This is an incorrect statement of law, and thus, the railroad was not entitled to such an instruction. Felder v. Union Pacific R.R., 660 P.2d 911, 914 (Colo. App. 1982).

The instruction was found to be capable of misleading and misinforming the jury, thereby constituting reversible error. Id.

The Appellate Court's comment that, "It is undisputed that the first portion of the instruction is obvious error", Smalley, supra. at 297, did not, as DWP suggests, mean that either DWP or the District Court agreed; obviously, they did not. Rather, it is recognition that **every court** that has passed on this instruction has held it reversible error.

**B. Jones v. Conrail Reversed a Jury Trial Because of this Very Instruction**

DWP claims that, "Recently, the United States Court of Appeals for the Sixth Circuit upheld a similarly worded instruction. Jones v. Conrail, 800 F.2d 590, 594 (6th Cir. 1986)" [DWP Petition at 35].

The Jones instruction was not only similarly worded, it is identical save for the term "whatever" preceding the word earnings in line 4. Jones, supra. at 593. Contrary to DWP's contention, the Jones court found this constituted reversible error:

> [T]he charge did not adequately inform the jury that the plaintiff was entitled to the difference between what he would have earned on the railroad and what he might have earned in another position. Because this may have affected the award of damages, it is also reversible error. Jones, supra. at 594.

It is not coincidental that the same erroneous instruction continues to surface in FELA cases. While no citation to authority was provided for the instruction as tendered, at oral argument DWP admitted it was taken from a handbook published by the National Association of Railroad Trial

Counsel, an FELA defense counsel association.

### C. When Two Conflicting Statements of Law Are Given, It Cannot Be Assumed the Jury Will Apply the Proper Rule

DWP argues that the jury instructions, read as a whole, correctly stated the law [DWP Petition at 33]. In reality, the Trial Court gave internally inconsistent instructions--first, the jury is told to award Mr. Smalley nothing if it finds he could have worked in the past, and did not; then it is told to award him the difference between what he could have made and what he did make. Smalley, supra. at 297. The same two contradictory statements were made concerning future earnings. Id.

When conflicting statements of law are given to the jury, with no guidance as to which is the correct statement, it cannot be assumed that the jury applied the correct law in reaching its decision.

Johnson v. Bryant, 671 F.2d 1276, 1281 (5th Cir. 1982). Faced with error by the Trial Court, the Appellate Court then had to determine if it was harmless error.

**D. To Determine Whether an Erroneous Jury Instruction Misled the Jury, the Reviewing Court Must Examine the Evidence**

A Court of Appeals reviews a jury instruction that misstates the law, or may mislead the jury, to determine whether there was a reasonable chance the jury was confused. Connecticut Mutual Life Ins. Co. v. Wyman, F.2d 63, 65 (3rd Cir. 1983); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981). The law requires the reviewing court to evaluate the verdict in the light of the evidence. Hallberg v. Brasher, 679 F.2d 751, 758 (8th Cir. 1982)["Furthermore, the error should be evaluated in light of the verdict"].

The Appellate Court correctly stated its duty under the circumstances:

> We evaluate the effect of error in instructions in light of the record as a whole. Rosebud Sioux Tribe v. A&P Steel, Inc., 733 F.2d 509, 517 (8th Cir.), cert. denied, 469 U.S. 1072 (1984). On this basis, we have reviewed the verdict in light of the parties' contentions, the evidence, and the entire charge [Emphasis Added]. Smalley, supra., at 298.

The Court then analyzed the factual record, and found, "The inadequacy of the verdict strongly suggests that the jurors believed that since he could have worked or been retrained for another job, he was entitled to no compensatory damages." Id.

Thus, the analysis of the evidence was not, as DWP asserts, performed to weigh its sufficiency, but to determine whether the erroneous jury charge may have influenced the verdict. As the evidence of Mr. Smalley's damages was so overwhelming and almost uncontroverted, all three judges

agreed the possibility was too high to permit the damages verdict to stand.[1]

## II. CONCLUSION

In its attempt to secure review, DWP misrepresents the record of the trial. DWP concentrated on the liability issue at trial. It introduced no medical testimony, nor did it present an expert to testify about Mr. Smalley's vocational skills, possibilities, or his claimed economic loss. It introduced no evidence of any job offers or possibilities for Mr. Smalley.

DWP equally mischaracterizes the Appellate Court's decision. The Trial Court misinstructed the jury, giving DWP's requested instruction on mitigation of damages. When faced with an error of law

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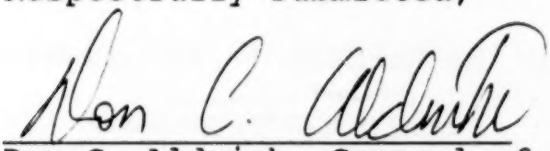
[1] Indeed, in his concurring opinion, Judge Arnold concluded that not only was it possible the jury misunderstood the law as a result of the instruction, it was probable. Smalley, supra., concurring opinion at 298.

in the jury instructions, the reviewing court must review the verdict in the light of the record as a whole to determine if the error was harmless or requires reversal. Faced with the overwhelming evidence of Mr. Smalley's physical disability, the Court concluded not only was it possible the jury had been misled, it was probable. The granting of the new trial on the issue of damages was required on the record before it.

There are simply no constitutional issues or questions of national import requiring review by this Court.

For the reasons set forth above, Respondent Kyle Smalley respectfully requests DWP's Petition for Certiorari be denied.

Respectfully Submitted,



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